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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 222.

THE WASHINGTONIAN PUBLISHING COMPANY, INC., *Petitioner*,

v.

DREW PEARSON, ROBERT S. ALLEN, AND VAN REES PRESS, INC., ET AL.

PETITIONER'S REPLY TO GOVERNMENT'S MEMORANDUM.

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REPLY IN OPPOSITION TO GOVERNMENT'S MEMORANDUM AS AMICUS CURIAE.

The petitioner is of the opinion that all of the contentions raised by the respondents in their petition for a rehearing had been considered and met in previous briefs filed by the petitioner, in the argument of the case and in the Court's opinion herein. In view of the unique memorandum filed by the Solicitor General on behalf of the United States as *amicus curiae* requesting that a rehearing be granted in the case, the petitioner respectfully submits for consideration by this Honorable Court the following reply in opposition to the respondents' petition for a rehearing.

It is noted that the Memorandum for the United States as *amicus curiae* is not an argument based upon any legal errors committed by the Court in its decision, but is predicated apparently upon three letters appearing in the appendix to the memorandum on pages 3 to 9 thereof. These three documents of about the same date contain assertions which have been injected into the case for the first time and are not matters of record. We call the Court's attention to the fact that neither the Registrar of Copyrights nor the Librarian of Congress have changed their position from that taken in the letter of the Registrar of Copyrights to the Librarian of Congress, dated September 17, 1938, which was referred to by the Court in its opinion on page 8. We do not deem it proper to answer the assertions in the Government's memorandum, including the letters appended thereto, but we do undertake to answer the questions of law raised.

The memorandum for the United States was not filed until Friday, March 3, 1939, some six years after the institution of the above entitled suit and 7 days after the expiration of the prescribed period for filing a petition for rehearing. The Government was at all times cognizant of the case and the issues involved therein. A representative of the Copyright Office testified at the trial of the case and a representative of that office was present at the argument of the case before the United States Court of Appeals for the District of Columbia and before this Court. The record, documents and briefs in the case were readily available to the Government, and in fact, all of the petitioner's briefs have been submitted to the Copyright Office. On several occasions counsel for the petitioner discussed the case with officials of the Copyright Office and suggested that that office file a brief in the case as *amicus curiae*, but it preferred not to do so. In this connection it is noted that in the letter from the Registrar of Copyrights to the Librarian of Congress, dated September 17, 1938 (*supra*) which was written *after* the decision by the Court of Appeals on

April 25, 1938, in favor of the respondents and *before* the granting on October 10, 1938, of the application for the writ of certiorari in the case by this Court, the Copyright Office expressed its views on the present question which are in complete accord with the decision of this Court.

REGISTRATION OF COPYRIGHT IS NOT INVOLVED.

The basic fallacy indulged in by the respondents and the Government is that the decision in the case by this Court involves the registration provisions of the Copyright Law. (U. S. C. A., Title 17.) On the contrary the sole question in the case was whether the Copyright Law requires the *prompt* deposit of copies of the work, containing the copyright notice, in the Copyright Office as a prerequisite to the right to maintain an action for the infringement of the copyright obtained under Sections 9 and 18 of the Act. This Court held that it did not.

Registration of copyright is not mandatory under the Copyright Law. Section 10 of the Act (the registration provision) provides merely that a "person *may* obtain registration of his claim to copyright". Nowhere in the Act is registration required, except as a prerequisite to suit. (Sec. 12) The petitioner's reply filed December 16, 1938, to respondents' supplemental brief filed after oral argument, fully covers this point.

THE ALLEGED LOSS TO THE GOVERNMENT IS NOT ONLY PROBLEMATICAL BUT IRRELEVANT.

The Government's memorandum appears to be primarily concerned with an alleged loss of registration fees by the Copyright Office. It is alleged therein that the Library of Congress is likely to be without a large number of desired works. In the latter connection it suffices to point out that the Copyright Law itself in Section 13 sets out in unambigious terms the manner and the right of the Library of Congress to obtain any book published that seeks the protections of the Copyright Laws.

As regards the Government's primary concern the decision of this Court should have no effect upon registration fees for, as hereinbefore pointed out, the decision in this case does not involve the matter of registration of copyright. Moreover, it is not to be supposed that the interpretation of a law should be forced by pecuniary interests of the Government which may be affected thereby.

The registration fee provided by the Act is not to raise revenue but is to defray the cost of registration if and when sought by the copyright owner. Should registrations decrease as predicted by the Government the Copyright Office would be relieved of the corresponding cost of handling such registrations. Furthermore, the Library would be saved the cost of handling and storing the works which it is alleged would not be deposited.[1] In the Government's memorandum are presented *merely* allegations as to a supposititious decrease in registration fees. The financial effect of a decrease in registrations and deposits cannot be even roughly estimated without taking into account the saving which the Copyright Office and the Library of Congress would be able to effectuate as hereinbefore indicated.

It is concluded that the alleged loss predicted by the Government is not only highly problematical but wholly irrelevant.

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[1] Although Sections 59 and 60 of the Copyright law provide for the disposal or destroying of deposited copyrighted works the following quotation from the annual report of the Librarian of Congress for 1938, page 429, is worthy of note: "The activities in connection with the care and maintenance of the building have been normal for the past year except as to crowded conditions due to accumulation of library material. The storage facilities throughout the building have reached their limit and the resulting congestion and constant shifting of material have added considerably to the duties of the labor force."

THE DIFFICULTIES OF ENFORCEMENT OF SECTIONS 30 AND 31 OF THE COPYRIGHT ACT ARE NOT ENHANCED BY THE DECISION OF THE COURT.

The difficulties of enforcement of Sections 30 and 31 of the Copyright Act are not enhanced by the decision of the Court. Section 56 of the Copyright Act relates to the compiling and printing of catalogues of copyright entries and the entries included therein are only those entries (as distinguished from entries of deposit of copies) of works where the owner of the copyright has exercised the option to register conferred upon him in Sections 10 and 55 and has elected to pay the specified fee. Until election has been exercised and registration secured there is no entry to be catalogued. It is presumed, however, that the owner of a copyright would register his copyright if there were any chance of importation of unauthorized editions of his work into this country.

The entry in the catalogue of the various registrations of The Washingtonian magazine as prescribed in Section 56 of the Act, are shown in the margin.[2] There is nothing in the catalogue entry relating to the registration of the De-

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[2] Excerpts from page 106, Catalogue of Copyright Entries, Part II, Vol. 28, 1933:

Washington Post Daily, fol. (c)
Washington Post Co. 8428-8517
No. 20653, (c) Jan. 1, 1933 (B175803)
to No. 20715. (c) Mar. 31 (B18840

Washingtonian (The) (c) Mayflower
log corp. 8518-8522
V. 6, 1931, Nos. 10-12.
Jan. (c) Jan. 10; B181706.
. . . . . .

(c) Washingtonian pub. co., inc;
8523-8529
V. 7, 1931, Nos 3-9
June. (c) June 10; B181711
. . . . . .
Dec. (c) Dec. 10; B181717

Watertown. (c) Chicago bridge & iron
. . . . . .

cember 1931 issue of the magazine, The Washingtonian, that would give the Treasury Department any information at all about the article, "The Mills of the Gods," admittedly pirated by the respondents.

Sections 30 and 31 of the Copyright Laws prohibit the importation into this country of any piratical copies of copyrighted works whether they be either registered or deposited or neither. The catalogues of copyright entries may be one source of information to aid in the enforcement of these sections, but they are not the sole basis of action by the Government. It may be assumed that a copyright owner, alive to his rights, would promptly report any violation of the law by importation affecting his copyright.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the respondents' petition for rehearing be denied.

Respectfully submitted,

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